95-1451

Supreme Court, U.S.
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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Class of Lourdes Gutierrez, et. al.,

Petitioner,

versus

Santa Ana Unified School District, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the U.S. Consitution grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic processes of our society?

2. Despite the Rowley decision, the U.S. Supreme court has never adequately defined what exactly is an educational benefit. Such exactitude is necessary for a proper analysis of what exactly is to be conferred upon disabled, elementary school students.

3. Although the United States Supreme Court has carefully declined to address the issue of whether Section 504 creates a private right of action, the

Circuit Courts of Appeal which have addressed the issue have uniformly upheld existence of such a Right. Clarity is needed on this issue.

4. Does wanton elementary instruction and willful non-assessment of elementary school students under IDEA, constitute violations of the guarantees of equal protection, procedural and substantive due process under the 14th Amendment to the United States Constitution since it is uncontested that the state of California has chosen to provide a system of education to the residents of California and the 14th Amendment requires that a state which has undertaken to provide the opportunity of an education make that opportunity available to all on equal terms--especially when the California Constution states education is a fundamental right.

5. Despite state case law and various government codes, is it illegal and unconsitutional for School districts and their employees to:

a) engage in bad faith school-wide policies which deprive the elementary school students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act; and

b) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and

c) refuse to assess students when their parents request assessment; and

d) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and

e) fail to inform or, in fact, misinform parents of their children's progress by (i) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (ii) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide; and

f) conduct in age promotion policy which pushes the students -- like herds of cattle -- to the next grade despite their illiteracy.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals of the State of California, Fourth Appellate District, Division Three are Respondents, Santa Ana Unified School District and its superintent, Rudy Castruita and Petitioners Lourdes Gutierrez on behalf of a class consisting of her son, Roberto Gutierrez and all students and parents of students of Glenn Martin Elementary School. The names of the remainder of the class other than those mentioned above were never determined as the underlying case never proceeded to that point.

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Bullington v. Missouri, 451 U.S. 430, (1981). 8

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Oregon v. Mathiason, 429 U.S. 492, (1977). 9

Pernell v. Southall Realty, 416 U.S. 363, (1974). 7

Pittsburgh v. Alco Parking Corp., 417 U.S. 369, (1974). 5

Plyler v.Doe, 457 U.S.202, 222-23, 102 S.Ct 2382, 2397, 72 L.Ed.2d 786 (1982). 2

Republic Steel Corp. v. Maddox, 379 U.S. 650, (1965). 9

Rice v. Sioux City Cemetery, 349 U.S. 70, (1955). 4, 7

Ross v. Moffitt, 417 U.S. 600, (1974). 1

San Antonio Independent School District v. Rodriguez , 411 U.S. 1, (1973). passim

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Texas v. Mead, 465 U.S. 1041 (1984). 4

Tibbs v. Florida, 457 U.S. 31, 39 (1982). 7

United States v. Johnston, 268 U.S. 220, (1925). 4

William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, (1974). 5

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Chevlin v. Los Angeles Community College Dist., 212 Cal.App.3d 382. 18

Peter W. v. San Francisco Unified Sch. Dist., (1976) 60Cal.App.3d 814. 17, 26

Serrano v. Priest (1976) 18 Cal.3d 728, 767-768). passim

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John F. Coverdale, *The Political Transformation of Spain after Franco* (New York: Praeger, 1979), p. 3. 33, 35

The Gorbachev Phenomenon: A Historical Interpretation (Berkeley, Calif.: University of California Press, 1987). 36

Linz (1979), p. 176. 34

The Political Economy of Communism Cambridge, Mass.: Harvard University Press, 1962), p. 329. 35

R. Hudson and J. R. Lewis, "Capital Accumulation: The Industrialization of Southern Europe?" in Allan Williams, ed., *Southern Europe Transformed* (London: Harper and Row, 1984), p. 182. 33

"Taiwan and Korea: Two Paths to Prosperity," *Economist* 316: 7663 July 14, 1990), p. 19. 35

JURISDICTION

Jurisdiction arises from Petitioner's right to seek certiorari in the Supreme Court to review a state court judgment "is not granted by any State, and exists by virtue of federal statute [28 U.S.C. §1257] with or without the consent of the State whose judgment is sought to be reviewed." Ross v. Moffitt, 417 U.S. 600, 617 (1974).

I. Introduction

Review by the U.S. Supreme Court differs fundamentally from review by the courts of appeal: The court of appeal's primary function is to review for trial court error; but the U.S. Supreme Court's purpose is to decide important legal questions and maintain national harmony and uniformity of decision.

a) Importance of Issues Involved

Petitioners respectfully request that each elementary school student be afforded a real educational opportunity to become critically literate in basic academic skills such as reading, writing, and arithmetic. The educational opportunity would guarantee that

each elementary child is not coerced into illiteracy by elementary schools that 1) engage in careless and wanton instruction, and 2) bad faith policies that preclude mandatory assessments under Individual with Disabilities Education Act (hereinafter referred to as IDEA).

The U.S. Supreme Court holding requested by Petitioners would merely grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic processes of our society. That is the crux of this case.

The importance of public education has been unequivocally recognized by the federal courts and, in particular, by the Supreme Court. In Plyler v. Doe, 457 U.S. at___, Justice Brennan astutely noted that:

> Public education is not a "right" granted to individuals by the constitution. [Rodriguez.] But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. ["Some] degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." [In] addition, education

provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Also, in Rodriguez, the Supreme Court reasoned that a class saddled with disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness commands extraordinary protection from the majoritarian political process. 411 U.S. at 40, 93 S.Ct. at 1300.

The Supreme Court held that:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual meri' [Illiteracy] is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile [a] status based denial of basic education with the framework of equality embodied in the Equal Protection Clause... (emphasis added)

Roberto Gutierrez is a member of a politically powerless class that has consistently been discriminated against--the disabled

illiterate children of the United States of America who cannot vote and cannot read.

The issues involved in this case deal primarily with the deprivation of educational opportunity as to elementary school students desperately trying to learn to read and write. The issues are intrinsically important, and "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). The issues relate "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955).

Petitioners are not seeking this Court to review a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments, or review of a factual issue. Thus, on this point, this Petition for Certiorari is in conformity with the law. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.).

Thus, in practical effect, the U.S. Supreme Court functions as an "institutional overseer" of the Nation's courts. It decides cases involving important public policy questions and other matters significantly affecting the administration of justice, and resolves conflicts among the courts. This particular case involves the dire need for a broad "institutional" review rather than mere error by the court of appeal. This case entails:

(a) a conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari. See Hudson v. Louisiana, 450 U.S. 40, 42 (1981); William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 14 (1974); Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 371-72 (1974). See also Limbach v. Hooven 69 Allison Co., 466 U.S. 353, 362 (1984), where the Court stated: "We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court."

(b) Even despite the absence of a conflict, state court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is

sufficiently important. E.g., Kolovrat v. Oregon, 366 U.S.187, 191 (1961). Respondents' bad faith school-wide policies deprive the elementary school Students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act (hereinafter referred to as simply 504). Specifically, Respondents willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed (CT, 65 and 223). In fact, teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities. (CT. 223).

Respondents equally refuse to assess students when their parents request assessment. (CT. 62-63). Even if the student is diagnosed with a disability, as Roberto was, Respondents refuse or unjustifiably delay to develop a special education program for the student. Moreover, Respondents fail to inform or, in fact, misinform parents of their children's progress by (1) refusing to provide the students' low CTBS scores which are addressed specifically to the parents (CT. 107); and (2) simultaneously giving these students As and Bs in these subjects when CTBS

scores indicate their in the bottom percentages nation-wide. (CT, 87, 107-112). Furthermore, Respondents' age promotion policy pushes the students -- like herds of cattle -- to the next grade despite their illiteracy. (CT 65-66, 105-106).

(c) Where a state court has decided a substantial and unsettled federal question arising under the Constitution and has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court should grant the petition for certiorari despite the absence of a conflict. See Oregon v. Kennedy, 456 U.S. 667, 668-69 (1982) (state court took an "overly expansive view of the Double Jeopardy Clause"); Tibbs v. Florida, 457 U.S. 31, 39 (1982) (certiorari to review "this interpretation of the Double Jeopardy Clause"); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); Davis v. Alaska, 415 U.S. 308, 315 (1974); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 (1977); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

(d) Where a state court has relied upon a prior Supreme Court decision, or a constitutional principle previously established by the Court, that is now considered ripe for reconsideration and possible

overruling or change, certiorari may be granted. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

Thus, it is vitally and critically important to understand that Petitioner admits and freely stipulates that there is no fundamental or statutory right to equal educational outcomes. The sturdy persistence of different educational outcomes is partly because we don't know how to change them, and partly because we feel that changing them would require intolerable violations of the freedom and privacy of individuals. If so, and if an obsession with equal outcomes does not lead us to disregard these inhibitions, then we will still have to retain the liberal conception of the right to education as an opportunity to which all are entitled but which some may not use effectively, even when initial conditions of equality have been substantially realized.

(e) Certiorari has also been granted to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation. See, e.g., Bullington v. Missouri, 451 U.S. 430, 432 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to

different kind of sentencing procedure); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) (certiorari granted to determine "whether the rationale of Moore v. Illinois Central R. Co. carries over to a suit for severance pay on a contract" subject to federal law); Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly"); Hankerson v. North Carolina, 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision).

(f) Certiorari may issue where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." Kosydar v. National Cash Register Co., 417 U.S. 62, 65 (1974). See also Smith v. United States, 431 U.S. 291, 293 (1977); Arizona v. Manypenny, 451 U.S. 232, 239 (1981).

The granting of Certiorari is clearly warranted in order to give substance to and accommodate the universal right to educational opportunity guaranteed under the U.S. Constitution and IDEA.

It is widely believed by the general public that there is a universal right to educational opportunity. While one might expect that a right of such evident importance would have been the subject of careful legal analysis and exposition, this turns out not to be the case at all. The Law does not give any indication of what the basis of the right to education is held to be, despite the fact that it is a fundamental right under the California Constitution Serrano v. Priest (1976) 18 Cal.3d 728, 767-768).

There have been almost no serious attempts by the State or Federal Courts to show just what is implied in the existence of a universal human right to educational opportunity or what rational justification there can be for the assertion that there is in fact such a right.

Perhaps one of the reasons why the right to education (in the form of actually being afforded an educational opportunity) has not been subjected to careful Judicial analysis is a deep-seated belief that the existence of such a right can be straight forwardly derived from more general laws. This is clearly not the case, as the desperate plight of Petitioners clearly shows.

Earlier cases have invoked the admittedly vague notion of a minimum or basic level of education to which everyone has a right; and this rather clearly suggested that beyond that level, one would either pursue one's education at one's own expense or no longer pursue a formal education. This is in fact not the view that Petitioners wish to advocate. Rather, the undeniable focus of this case is as to educational opportunity, and not in anyway advocating any sort of minimal outcome of Education to which California elementary school students are entitled. It is primarily this, that makes this case one of first impression for the U.S. Supreme Court.

Opportunities for education are to be offered to all on an equitable basis; and whether people make proper use of these educational opportunities is, by implication, their responsibility. But it is well known that even when these opportunities are offered, our ability to take advantage of these educational opportunities varies widely in a way that reflects the decisive importance of such influences as socio-economic status, the quality of family life, the medical and nutritional care a child receives and so on. The outcomes of education—the relative

success or failure of differently situated children to achieve the goals of education— certainly vary in a way that testifies to these influences (and this the State Appellate Court correctly noted); and many wrongfully draw the conclusion that the right to education, if it is to be at all meaningful, requires that all of these factors that influence educational outcomes be substantially equalized. Only then, it is argued, will the opportunity for education be really equal for all and the universal right to education, a reality. This is hogwash.

From such a wrongful view, it is only a step to the conclusion that a right to education based on the formal openness and availability of educational opportunity has little value and that the right to education must henceforth be construed as a right to equal educational outcomes, especially as between members of differently circumstanced racial and economic groups (On this point the Appellate Court was correct, although it very wrongfully misconstrued Petitioners case as advocating this position despite Petitioners' 150 page Brief to the contrary.) It is this extremely false and malignant reinterpretation of the notion of a right to

education that has plaqued Courts from putting the proper focus upon educational opportunity, and not outcome.

If the basic right to an education is well conceived, it would undoubtedly afford the elementary school student an actual opportunity to acquire the basic academic competencies to a degree that will permit him to use them effectively and to go on learning by himself in at least some areas. That is the essence of this case.

Stepping in this laudable direction, the U.S. Supreme Court should implement existing constitutional and statutory laws which already require that all elementary students receive a free, and now, appropriate educational opportunities as to basic academic skills. Kids simply deserve a real chance to learn their ABCs.

The U.S. Supreme Court should also re-evaluate the Federal law in light of the realities of our Information Age society and permit a cause of action against school districts whose conduct is based on bad faith attempts to deprive the students of an educational opportunity. No longer should government codes protect willful fraud on the part of Santa Ana School District employees. No longer should the U.S. Supreme Court condone,

through Judicial tolerance, the intentional infliction of emotional distress and the procedural and substantive violation of Federal Due Process inflicted daily upon children and parents by Santa Ana School District employees.

For these reasons and those set forth below, Petitioners should be allowed their day in our U.S. Supreme Court.

II. STATEMENT OF THE CASE

On October 2, 1992, Lourdes Gutierrez filed a lawsuit against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The first amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorney fees.(CT. 58). On October 13, 1992, the District administrators' response to these allegations (per print media) was that students' academic problems stem from their disadvantaged backgrounds.

In fact, the District administrators went so far as to pat themselves on the back for a job well done.(CT. 103). (See Appendix II,).

It is noteworthy (as it is quite rare) that the trial court judge felt this case important enough to accept a twenty five page policy argument document from Petitioners prior to the demurrer hearing.(CT. 224). (See Appendix III). However, on December 16, 1993, the trial court sustained the demurrers of the school district and Dr. Castruita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action lawsuit and failed to state any cognizable cause of action.

Petitioners appealed the trial court's ruling. The Fourth Appellate District affirmed by unanimous decision.

III THE STATEMENT OF ISSUES

Did you know that your fifth-grader can be reading at a first-grade level and still get good grades?

And the California Appellate Court, Fourth District, says it's OK!

Did you know that teachers, schools and districts can lie to parents about their child's ability? The Court says that's OK, too!

But remember: it's against the law to not send your child to elementary school, no matter how negligent the education.

In the case of Gutierrez vs. Santa Ana Unified School District, the Court has held that there is no actionable standard of care in education. None. There is no actionable standard for teachers, administrators or districts.

In other words, no district, school or teacher can be held liable for negligence in teaching our children, no matter how poor the job, no matter how deprived the children, no matter how blatant the lack of professionalism.

If the School District sincerely believes your child is disabled, they do not have to tell you. They can even intentionally deceive you, and they are immune by the courts from any liability. You have absolutely no legal recourse.

The Court has held that as long as there is "equity in funding", no other test can be applied to the performance of a teacher, a school or a district!

Moreover, there is simply no accountability mechanism to compel any district, school, or teacher to instruct or assess our children in a non-negligent manner.

1) Some of the wrongful holdings by the Appellate Court in this case are as follows:

1. [Gutierrez urges us to disagree with *Peter W.*, arguing the issue is really a question of proximate cause for the jury, i.e., was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimed here is Petitioner's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." *(Peter W. v. San Francisco Unified Sch. Dist.*, (1976) 60Cal.App.3d 814.) ((But my case only goes to the teaching and administrative process)) We agree with the *Peter W.* court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process.] [Excerpt from the Appellate Court's ruling.] [Emphasis added.]

Please note that the Appellate Court's ruling is a vast extension of the Peter W. ruling in that this Appellate Court did not merely find no duty in teaching, but rather, the Fourth Appellate Court held that the entire bureaucratic administration in the academic phases is not accountable. This means that the Santa Ana School District is not only entirely unaccountable if they teach, what they teach, or how they teach, but are also unaccountable as to the assessment and identification of disabled students under IDEA or any other administerial aspect of a student's experience within the "public educational process."

Essentially, the Santa Ana School District has free and complete reign in how it conducts itself in the educational process. The Santa Ana School District is completely immune as to any legal accountability. This is wrong and immoral and unconstitutional.

2. [Gutierrez's second and third causes of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. *(Chevlin v. Los Angeles Community College Dist., supra,* 212 Cal.App.3d 382)] [Excerpt from the Appellate Court's ruling.] [Emphasis added]

This gives the Santa Ana School District authority to act with complete impunity as to deceiving both students and parents. This type of reasoning allows the Santa Ana School District to give illiterate elementary school students, like Elizabeth Esparza, A's and B's in reading and spelling when in fact they are in the bottom ten percent of the Nation according to the objective findings of the CTBS scores. These highly relevant CTBS scores are not mailed to the parents, although the meaningless A's and B's in reading and spelling are. Parents are intentionally deceived and thereby made fools of; and the State, according to the Appellate Court, has granted the Santa Ana School District complete immunity from any legal accountability as to these lies and deceptions regarding the true academic standing of their elementary school children. And, as the facts indicate, deception was one of the primary complaints by Petitioners. Where is the Justice?

3. [Although the right to an education is not guaranteed under the federal constitution *(San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution *(Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the right to equality of funding or access to education, not the level of quality. *(Ibid.; Buff v. State of California* (1992) 4 Cal.4th 668.)].

It should be obvious to anyone, that equality of funding has no inherent bearing whatsoever as to how the Santa Ana School District conducts its duties toward both elementary students and parents. Also, although the Appellate Court freely admits the fundamental right granted by the California Constitution at least means access to an education, it seems unable to freely admit that the quality of the access to educational opportunity is also relevant as to the elementary education one can hope to achieve.

Petitioners primary thrust, all along, has been to assert that the access afforded to elementary school students by the Santa Ana School District has been equivalent to a penitentiary, to which elementary school children are compelled by Law to attend. Elementary school are reduced to the status of a daily prisoner, when students are not afforded any real opportunity to learn even the most basic academic skills, such as reading, writing, and arithmetic. This daily deprivation of liberty, the educational property interest granted by the California Constitution, and the inherent Due Process afforded by both the State and Federal Constitution must cease!

4.[Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing *DeShaney v. W nnebago Cty. Soc Servs. Dept.* (1989) 489 U.S. 189, she claims the students were deprived of liberty without due process. ... Compulsory school attendance laws do not create a special relationship between the student and the school.*(Graham v. Independent Sch. Dist.* (10th Cir. 1994) 22 F.3d 991, 994.)] [Excerpt from the Appellate Court's ruling.] [Emphasis added].

Basically, Petitioners argued throughout their extensive Appellate Brief, that it is both unfair, illegal, and immoral to compel elementary school students to an institution for six years, six hours a day, if they are not even afforded a real opportunity to learn even the most basic academic skills such as reading, writing, and arithmetic. On this pertinent issue, the Fourth Appellate Court is simply dead wrong in their nefarious assertion that a special relationship is not created by the California compulsory attendance laws; or in the alternative, if the Appellate Court is deemed right by this Supreme Court, then the compulsory laws compelling kids to the Dumbo Elementary Penitentiary should be abolished forthwith. That is only fair.

Also, as to deprivation of Due Process, Petitioners incessantly argued that they were deprived of liberty by being compelled to go to a school where they are not even afforded a chance to learn even the most basic academic skills.

Petitioners were also deprived of their Educational property interest as guaranteed by the California Constitution in that, to not afford elementary school students the opportunity to learn the academic basics in an Information Age is to damn them to economic deprivation and political impotence.

This is tantamount to theft from little kids. The only bauble California put in their pockets at birth was a crumpled IOU to come learn of life within our mighty Sequoias and of academics in our humble classrooms.

At minimum, there is a special relationship between a School District and their elementary school students such that a School District cannot:

1) engage in bad faith school-wide policies which deprive the elementary school students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act; and

2) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and

3) refuse to assess students when their parents request assessment; and

4) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and

5) fail to inform or, in fact, misinform parents of their children's progress by (a) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (b) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide; and

6) conduct in age promotion policy which pushes the students -- like herds of cattle -- to the next grade despite their illiteracy.

Lastly, let me, once again, make this perfectly crystal clear. Petitioners never ever argued that the Santa Ana School District is or should be in any way held responsible for the ills of society. Petitioners also never argued that the Santa Ana School District should in any way be held accountable for how a students "turns out" academically.

Petitioners only requested that the Appellate Court hold: The Santa Ana School District must only teach not poorly, only in elementary school, and only as to basic academic skills such as reading, writing, and arithmetic. Notice that Petitioners did not ever argue that the Santa Ana School District must even teach or administer itself well. No! No! No! Petitioners only only argued that the Santa Ana School District conduct its responsibilities not poorly. They only have to do their job not crappy. Yet even this minimal duty of care toward elementary school students the Appellate Court found "unworkable."

But what Petitioners have found "unworkable," is the present state of public education in Santa Ana. Urban public school systems, such as the Santa Ana School District, present a curious amalgam of inherent structural and ideological defects; it is no

wonder that they have failed to carry out even their own self-imposed regulations and duties.

Despite its promises, the panacea of Education has not reformed society.

The "professional" Educationists are mummies with framed paper, credentialed by Education departments from all around their self-referential world.

They have not won the allegiance of the poor and the black. The impoverished rightfully hate them, and when they grow up its all payback and graffiti.

They have not bound Americans to each other in affection and respect.

They have been erected first and foremost upon a soft, evasive intellectual base.

They have depended on a continued reluctance to compare their actual and official functions to their stated and operative purposes.

They have developed organizational structures that move them ever farther away from interaction with the communities they serve.

And, finally, they have even refused to accept responsibility for educating anybody successfully in anything. This the State Appellate Court has condoned and fostered in its protective decision:

"...Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." *(Peter W. v. San Francisco Unified Sch. Dist., supra, 60* Cal.App.3d at p. 824.) We agree with the *Peter W.* court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process. [Emphasis added]

Once granted a captive audience by compulsory attendance laws, they have had little need to succeed; it has been easier to develop a battery of excuses that place the blame for educational failure outside the school and on the home.

This is evil at its best, and with a smile.

I. ROBERTO GUTIERREZ ARTICULATED CLEAR AND CONVINCING FEDERAL CONSTITUTIONAL CLAIMS IN HIS PLEADINGS BY APPLYING THE *RODRIGUEZ* CONCEPTUAL FRAMEWORK OF EDUCATION AS A RIGHT.

The usefulness of viewing the right to an education as a principle is evident in a consideration of the Supreme Court case San Antonio School District v. Rodriguez. Justice Thurgood Marshall, in his dissenting opinion, argued that the right to education is tied to constitutional rights in principle. In this view, the capacity to think critically is necessary if citizens in a democracy are to participate intelligently in the political life of the country and if other constitutionally protected liberties, such as freedom of speech, the freedom of association, and the right to vote, are to be meaningfully enjoyed. The inability to think critically is undoubtedly an extraordinary constraint in exercising one's liberties in a meaningful way. The inability of adults to make thoughtful choices, intelligent personal plans, and critical judgments upon public pronouncements clearly undermines the values of liberty and autonomy, upon which liberal democracies are based.

In the Rodriquez case, Mexican-American parents of children attending schools in Edgewood Independent School District in San Antonio, Texas, charged that the Texas school finance scheme was unconstitutional because far less money was spent on their children than was spent on children in other San Antonio school districts, and, thus, they argued that the Texas financing scheme violated the equal protection clause of the Fourteenth Amendment. One of the issues in the case was whether education was a constitutional right or not; if education was to be deemed such, the Texas scheme would be subjected to strict judicial scrutiny, and a heavy burden of proof would be placed on Texas to show a compelling interest in its financing scheme.

The majority of the Court held that "education is not among the rights afforded explicit protection under the federal Constitution." "Nor," Justice Lewis Powell asserts, "do we find any basis for saying it is implicitly so protected." Although the majority of the Court concluded that there was no constitutional right to education, the content of this conclusion is not readily obvious. What was it that there was no constitutional right to? Moreover, what kind of right was being denied? First, the Court

did not see itself dealing with a constitutional liberty, such as the right to free speech or the free exercise of religion. Rather, it viewed "the right to education" as a right to schooling. In this regard, Powell asserts:

> Even if it were conceded that some quantifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right (the right to free speech or the right to vote), we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.[1]

In Marshall's dissenting view, denying to education the status of a constitutional right oversimplifies and misrepresents the issue of its fundamentality, for the Court had previously protected other fundamental interests that were not explicitly or implicitly spelled out in the Constitution, including the right to procreate and the right to access to criminal appellate processes. The fundamentality of education as an interest lies, according to Marshall, in the "nexus between specific constitutional guarantees and the

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[1] *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972) at 30; at 33-34. It should be noted that attorneys for Texas frankly admitted that they could not show a compelling interest in Texas's financing scheme.

nonconstitutional interest." If this nexus is a close one, the nonconstitutional interest—in this case, education—becomes fundamental. Marshall acknowledges that " this Court has never deemed the provision of free public education to be required by the Constitution. " Nevertheless, his argument does underscore the fundamental interest citizens have in educational opportunities. According to Marshall, "the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded to public education in our society, and by the close relationship between education and some of our most basic constitutional values."[2]

Marshall's argument that the fundamental interest in education provides a guideline in determining how much scrutiny Texas's financing scheme deserves brings to light the distinction between how the right to education would function as a rule or as a principle. As a rule, the right to education would specify a particular kind of entitlement, and one could easily determine whether the state was or was not providing or honoring such an

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[2] Id. at 111.

entitlement. As a principle, the right to education would simply provide a general guideline for examining whether the state was or was not fulfilling its obligation to provide educational opportunities to people on a nondiscriminatory basis. Marshall's argument points to the flexibility to be gained in considering "the fundamental interest in education" not as a specific entitlement to a certain amount of schooling or to schooling at all.

The dissent did not go far enough in suggesting why the fundamental interest in educational opportunities qualified those opportunities to be regarded as a right of all citizens (though clearly not as the right to schooling; the right to educational opportunities is a broader principle than a specific entitlement to schooling). The justification for regarding the right to education as a legal principle lies in its intimate connection with other constitutionally protected values, including the right to free speech, the right to free association, the right to vote, and the general privilege of participating in the political processes.

II. THE WILLFUL CONDUCT BY RESPONDENTS DEPRIVES ELEMENTARY SCHOOL STUDENTS OF DUE PROCESS, THE BENEFITS OF VARIOUS STATE AND FEDERAL STATUTES AND FUNDAMENTAL AMENITIES GUARANTEED BY BOTH THE CALIFORNIA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

a) As World History Clearly Indicates, To Not Afford Students An Educational Opportunity To Learn Basic Academic Skills In Elementary Schools Is To Cripple Them To The Status Of Second-Class Citizens, And Handicap Their Ability To Express Themselves Even Minimally In Political Expression And In Their Pursuit Of Livelihood And Happiness.

The tight relationship that exists between economic development, educational levels, and democracy is illustrated quite clearly in Southern Europe. In 1958, Spain embarked on a program of economic liberalization in which the mercantilist policies of the Francoist state were replaced by liberal ones linking the Spanish economy to that of the outside world. This led to a period of very rapid economic growth: in the decade before Franco's death Spain's economy grew 7.1 percent per year. It was followed closely by those of Portugal and Greece, which achieved

growth rates of 6.2 and 6.4 percent per year, respectively.[3] The social transformations brought about by industrialization were dramatic: in Spain, only 18 percent of the population lived in cities of over 100,000 population in 1950; by 1970, this figure had increased to 34 percent.[4] In 1950 half the populations of Spain, Portugal, and Greece were engaged in agriculture, compared to an average of 24 percent for Western Europe as a whole; by 1970 only Greece remained above that latter figure, while in Spain the percentage had dropped to 21. With urbanization came higher degrees of education and personal income, and an appreciation of the consumer culture that was

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[3] R. Hudson and J. R. Lewis, "Capital Accumulation: The Industrialization of Southern Europe?" in Allan Williams, ed., *Southern Europe Transformed* (London: Harper and Row, 1984), p. 182. See also Linz (1979), p. 176. These were higher growth rates than either the six original members of the EC, or the nine members, after the community underwent its initial expansion, in a comparable period.

[4] John F. Coverdale, *The Political Transformation of Spain after Franco* (New York: Praeger, 1979), p. 3.

being created within the European Community. While these economic and social changes did not in themselves bring about greater political pluralism, they created the social milieu under which pluralism could flourish once political conditions became ripe. The Francoist commissar of the Plan for Economic Development who oversaw much of Spain's technocratic revolution, Laureano Lopez Rodo, was reported to have said that Spain would be ready for democracy when per capita income reached $2000. This proved quite prophetic: in 1974, on the eve of Franco's death, per capita GDP stood at $2,446.[5]

A similar linkage between economic development and liberal democracy can be seen in Asia. Japan, the first East Asian state to modernize, was the first to achieve a stable liberal democracy. (Japan's democratization was accomplished at the point of a gun, so to speak, but the result proved durable long past the point where democracy could be said to have been imposed coercively.) Taiwan and South Korea, with the second- and third-highest levels of education and per capita GNP, have experienced the greatest

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[5] Linz (1979), p. 176.

change in their political systems.[6] In Taiwan, for example, 45 percent of the ruling Guomindang party's Central Committee have higher educational degrees, many of them earned in the United States.[7] Forty-five percent of Taiwanese and 37 percent of South Koreans receive some higher education, compared with 60 percent of Americans and 22 percent of Britons. And indeed, it is the younger, better educated members of Taiwan's Parliament that have pushed the most strongly to make it a more representative institution. Australia and New Zealand, those lands of European settlement in Asia, had of course modernized economically and democratized well before World War II.[8]

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[6] Coverdale (1979), p. 1.

[7] "Taiwan and Korea: Two Paths to Prosperity," *Economist* 316: 7663 July 14, 1990), p. 19.

[8] In the early 1960s Peter Wiles pointed out that the Soviet Union was beginning to educate its technocratic elite according to functional rather than ideological criteria, and that this would eventually make them understand the irrationality of other aspects of their economic system. See *The Political Economy of Communism* (Cambridge, Mass.: Harvard University Press, 1962),

Russia as well has been undergoing a comparable social transformation, though at a slower pace than the countries of Asia. It too has changed from an agricultural to an urban society, with increasing levels of mass and specialized education.[9] These sociological changes, going on in the background while the Cold War was being fought out in Berlin and Cuba, were conditions that encouraged the steps subsequently undertaken toward democratization.

Looking around the world, there remains a very strong overall correlation between advancing socio-economic modernization, high-levels of education and the emergence of new democracies. Traditionally the most economically advanced regions, Western

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p. 329. Moshe Lewin has made a great deal of urbanization and education as the ground for *perestroika.* See *The Gorbachev Phenomenon: A Historical Interpretation (* Berkeley, Calif.: University of California Press, 1987).

[9] Most of this literature, however, discusses how education qualifies people for democracy and aids in its consolidation, rather than explaining why education should predispose people toward democracy.

Europe and North America, have also hosted the world's oldest and most stable liberal democracies.

The only apparent regional anomaly is the Middle East, which possesses no stable democracies, and yet contains a number of states with per capita incomes on a European or Asian level. But this is easily explained by oil: income from petroleum has permitted states like Saudi Arabia, Iraq, Iran, and the UAE to acquire the trappings of modernity—automobiles, VCRs, Mirage fighterbombers, and the like—without having had their societies go through the social transformations that come when such wealth is generated by the labor of their populations.

b) Specifically, Advancing Industrialization Produces Liberal Democracy Because An Essential Key To Modern Industrialization Is A Skilled, Educated Work Force.

The most powerful line of argument linking economic development with liberal democracy is that successful industrialization produces middle-class societies, and that middle-class societies demand political participation and equality of rights. Despite the disparities in income distribution that

frequently arise in the early phases of industrialization, economic development ultimately tends to promote the broad equality of condition because it creates enormous demand for a large, educated work force. And such a broad equality of condition arguably predisposes people to oppose political systems that do not respect that equality or permit people to participate on an equal basis.

Middle-class societies arise as a result of universal education that affords real opportunities to learn. The link between such an education and liberal democracy has been frequently noted, and would seem to be an all-important one.[10] Industrial societies require large numbers of highly skilled and educated workers, managers, technicians, and intellectuals; hence even the most dictatorial state cannot avoid the need for both mass education and open access to higher and specialized education if it wants to be economically advanced. Such societies cannot exist without a

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[10] In developed countries one obviously finds under-employed Ph.D.s who earn less than real-estate developers with high-school diplomas, but by and large there remains a high correlation between income and education.

large and specialized educational establishment. Indeed, in the developed world social status is determined to a very large degree by one's level of educational achievement.10 The class differences that exist in the contemporary United States, for example, are due primarily to differences in education. There are few obstacles to the advancement of a person with the proper educational credentials. Inequality creeps into the system as a result of lack access to education; lack of education is the surest condemnation to second-class citizenship.

The effect of education on political attitudes is complicated, but there are reasons for thinking it at least creates the conditions for democratic society. The self-professed aim of modern education is to "liberate" people from prejudices and traditional forms of authority. Educated people are said not to obey authority blindly, but rather learn to think for themselves, to think critically. Education also makes people demand more of themselves and for themselves; in other words, they acquire a certain sense of dignity which they want to have respected by their fellow citizens and by the state. In a traditional peasant society, it is possible for a local landlord (or, for that matter, a communist

commissar) to recruit peasants to kill other peasants and dispossess them of their land. They do so not because it is in their interest, but because they are used to obeying authority. Urban professionals in developed countries, on the other hand, can be recruited to a lot of nutty causes like liquid diets and marathon running, but they tend not to volunteer for private armies or death squads simply because someone in a uniform tells them to do so.

Educational opportunity is crucial in sustaining a stable democracy, and elementary students should be afforded such a critical opportunity. To hold otherwise, as the Appellate Court did, is to deprive Petitioners of Due Process, specifically of their Liberty interest by being legally compelled to attend an elementary school where they are not even afforded a chance to learn basic academic skills. Petitioners are also being deprived of their Educational property interest as guaranteed by the California Constitution in that to not even be afforded the opportunity to learn the academic basics in an Information Age is to damn these elementary school students to economic deprivation and political impotence.

III. THIS CASE DEALS WITH POLICY ISSUES THAT ARE CLEARLY INSTITUTIONAL, THE SIGNIFICANCE OF WHICH IS GUARANTEED TO AFFECT VARIOUS AND INTEGRAL RIGHTS OF OTHER ELEMENTARY SCHOOL STUDENTS IN OTHER CASES

"Institutional" (public policy) issues relate to the very purposes of education. It must be emphasized that, opinion to the contrary notwithstanding, people ask no more of schools today than they did a hundred and twenty-five years ago. Even then the schools were asked to do the impossible. The purpose, back then and now, of the "public educational process" always has been more the development of attitudes than of intellect, and this continues to be the case.

It is clear that the powers of schooling have been vastly overrated. Despite substantial financing and a captive audience, the schools have not been able to attain the goals set for them, with remarkably little change, for the last century and a quarter. They have been unable to do so because those goals have been impossible to fulfill. The "public educational process" requires fundamental social reform, not the sort of tinkering that educational change has represented.

The moral should be clear. The U.S. Supreme Court must begin to distinguish between what formal schooling can and cannot do. This Supreme Court must separate the teaching of skills from the teaching of attitudes, and concentrate on the former. In actual fact, it is of course impossible to separate the two; attitudes adhere in any form of practice. But there is a vast difference between leaving the formation of attitudes untended and making them the object of education.

In the popular fairy tale of school-time Past, schools once upon a time concentrated on the three R's. With no nonsense and remarkable success, they taught children to read, write, cipher, and spell. Then along came progressivism, which turned the schools into a combination social-service and life-adjustment bureau, forgetting, in the process, all about training in skills and the importance of the intellect. That history is simply false. The denigration of intellect and the neglect of skills have been continuing features of the history of public education; early school promoters believed quite as much as progressives that they were creating institutions to alleviate and prevent social problems.

The way out of this problem is once again to take the schools out of the business of making attitudes. Have them attend to skills, especially, in the beginning; and the question of whose values control the schools becomes largely irrelevant. For it is my premise that the desire that children become functionally literate and able to understand mathematics is nearly universal; it is as true of poor as of affluent parents.

To talk of cultural deprivation is to patronize the poor; it also is to deflect effort away from the education that they need. Poor children need to learn to read, not to visit museums, and I have seen no evidence of a correlation between the two.

People have a right to hold whatever beliefs and whatever attitudes they please; that is the only consistent position for a civil libertarian. It follows that the attempt in schools to define one set of attitudes as superior to another, the attempt to teach patriotism, conventional morality, or even its opposite in a compulsory public institution represents a gross violation of civil rights.

My point is that educational law should define strict educational tasks and that schools should concentrate on those. Any such definition must include, at one end of the spectrum,

fundamental skills; at the other, it must exclude the conscious attempt to formulate social attitudes. Schools should be made open, humane places for the simple reason that children have every right to be happy and to be treated with dignity and respect.

Petitioner's requested holding will undoubtedly include a shift of power to teachers and students, away from administrators and bureaucrats. For decentralization from the law to bring about improvements, the teacher as well as the school must be liberated. (a legal duty from the school will liberate the teacher to carry out the legal responsibility of the school district.)

Professional educationists can offer a great deal of assistance, but the days when they should offer blueprints have ended. Let us be thankful, for that system has brought us to where we are: Too many children do not learn well and are unhappy in school; teachers suffer and lack autonomy; parents are dissatisfied; and economists warn of impending massive unemployment. Not even a college degree assures one a job any more. Aside from the bureaucrats who feed off the education system, and I do not mean the teachers, it has served no one very well. We are all its victims, and no one has done very much constructive about that for the

last century. I should like to think that the time has come for Petitioners to have their day.

IV. THE REQUESTED LAW WILL TRANSFORM SCHOOLS BY AFFORDING ALL STUDENTS THE EDUCATIONAL OPPORTUNITIES GUARANTEED BY STATE AND FEDERAL LAW.

a) The Court's ruling will transform the unconstitutional Santa Ana School District,

for the power of the Law lies in the details. Here's how:

The successful School District is the School District that organizes itself as a learning system in which every part is designed to promote and accelerate both individual learning and collective learning—and to put that learning to productive use.

For fifty years or more, every reform in American education, from the Master of Arts in Teaching degree to the "new math", from parent participation to team teaching, has been based on the premise that the basic organizational and management structure need not change. The only important exception, educational vouchers, is an off-centered attempt to strike at the heart of the problem. All of the earlier reforms in curriculum, teaching method, and school organization have ultimately disappointed their advocates. All have been rejected or watered down in the course of time by the larger system, which seems impervious to any real changes at all. It is the system that is the problem, and

only basic legal changes toward the structure of the system will fix it.

The most striking feature of our schools is that the quality of the students they graduate is mostly a function of the background of the students they enroll. Schools that enroll wealthy students produce accomplished graduates and those that enroll students from low-income families typically produce students with poor academic records. We think of the first set as good schools, but there is no reason to do so. A truly good school would be one that graduated students who are more successful than would be predicted by their social class.

Now here is the curious thing. One would think that schools with better results than could be predicted by the social class of their students would be widely imitated, that successful programs of any sort would be quickly identified by school boards and superintendents, copied instantly, and quickly improved upon. But nothing of the sort actually happens, as countless innovators, philanthropists, and government planners have discovered. Through decades of educational history in this country, programs of unquestioned effectiveness have spread very slowly, if at all. In

fact, teachers and principals who have achieved such successes have often done so as renegades within their districts, and are given the cold shoulder by their colleagues and superiors.

The reason is not hard to find. Success in educating students is not reflected in the pay of teachers or principals, nor is it rewarded with opportunities for advancement in the system. These facts are merely indicators of a broader problem. School districts are not performance-oriented organizations. There is no bottom line and there are no rewards for achieving it. Superintendents are the only people in the entire system who can be fired without going through numbingly complex procedures. What a superintendent most fears is anything that will result in a controversy that will appear in the press and provide an excuse for a board member to threaten his or her control of the system or job security. The way to minimize such controversy is to make sure, first and foremost, that everyone in the system is loyal—to the person in the hierarchy above and, ultimately, to the superintendent.

Loyalty to the system, <u>not contribution to student performance</u>, is thus the primary criterion for success in the schools. That is why new methods of proven effectiveness are so often ignored. If

implementing the innovation is likely to arouse the wrath of anyone inside or outside the system, it is quietly shelved, along with the person who promoted it. The system's primary obligation is not to its students, but to itself.

Imagine now that school districts were organized and managed in such a way that everyone in them was striving constantly to improve student performance. A system for doing just that is the first of three keys to producing a world-class education system in the United States. The other two keys are the creation of systems of educational standards and of incentive systems that reward all the participants when those standards are achieved.

Petitioner's goal is to make an enormous improvement in educational achievement at a modest increase in cost. We need to start by being very clear about what business School Districts are in. We must have our goals straight and clear. This court must mandate what every excellent business already does: The Law will give incentive for the School District to communicate its goals of non-negligent instruction to everyone in the organization, and make damn sure that everything top management does reinforces those goals so that no one could forget them. In order to avoid

legal liability the School District will be prompted, as lawyers and doctors have been prompted by the possibility of malpractice, to find measures of progress against those goals of non-negligent instruction that reflect what they want to achieve.

The School District will undoubtedly change their incentive systems so that there will be real rewards for performance and real penalties for nonperformance, and personal accountability will create strong incentives to contribute to the School District's goals. The School District will make major investments in new systems to give teachers the skills, time, and information they would need to function in the new environment. Then the School District will push a lot of decisions that had been made by middle and top management down to the front line, to those people closest to the customer--the student. And the School District, can then rightfully, hold those on the front line accountable for the results of their work, having gotten rid of as much as possible of the bureaucracy that used to be there to tell the lower levels what to do and how to do it.

Pushing decisions down to the elementary school level puts a premium on the quality of school staff, particularly teachers. But

today, in a Taylorist system like the public schools, it makes very little sense to invest heavily in the recruitment, selection, and training of front-line staff—in this case teachers. After all, teachers are interchangeable parts, not to be relied on for independent judgment, there to do as they are told. Teacher compensation systems are very revealing in that respect. After teachers reach about twelve years of service, they typically get only cost-of-living raises. After that point, the system reasons, it is cheaper to get two new teachers who'll be just as effective. This is hardly the view one would take if one valued the professional competence of teachers as we value the professional competence of lawyers, architects, or accountants. It is the way we view counter-workers in a fast-food restaurant.

From this we can reasonably conclude that teachers are <u>not</u> regarded by the Santa Ana School District as the key to the success of schools, all the rhetoric to the contrary notwithstanding—<u>management is</u>. But in a transformed environment as mandated by Law, everything will depend on the capacity of the teachers and school-level administrators to exercise independent judgment with a high degree of <u>professionalism</u>. So

it makes all the difference who is hired, how they are initially trained, and what provisions are made for their continued development through their whole career in education.

Given the urgency of the requirement to build a new system for teacher recruitment, selection, and hiring, the requested Law would do this by creating an immediate incentive to have teachers who teach basic academic skills to elementary students in a non-negligent manner.

This incentive must come from outside the system, from the Courts. Only this Supreme Court can initiate what needs to be done, since the School District is presently a legally unaccountable public agency, and adamantly refuses to pick up the gauntlet and carry out its duties towards elementary school students in a non-negligent manner.

The reasons for this willful refusal are all too clear. First, the Santa Ana School District is a public agency operating in a political fishbowl, making it far harder for the chief executive officer (the Superintendent) to formulate a plan and execute it. Second, while private employees were often willing to make fundamental changes in the organization because the alternative

would be bankruptcy and unemployment, no one in the Santa Ana School District seems to believe that anything would happen to them if the District fails and remains inherently incompetent. Thus, there is no true incentive to take the tough measures needed to guarantee elementary school students the real opportunity to learn basic academic skills. Only this Supreme Court's ruling will change this immediately, and effectively.

The Supreme Court's ruling will guarantee School District's establish responsibility for planning and policy related to restructuring and to put in place a management system that would establish priorities, assign tasks, allocate resources, track their progress, and make corrections along the way to make damn sure little kids get a real chance to learn the basics.

The approach to restructuring here must depend heavily on creating a new organizational culture within the school district, a compound of new values and new skills. The overriding value for every school district in California must be: "All Kids Can Learn," and the companion goal of creating a school district in which the academic achievement of the students cannot be easily predicted by the incomes of their parents.

One of the major differences between a manufacturing firm and schools, of course, is the fact that the material with which the professionals work consists of people, namely students, not inanimate objects. One of the major problems facing urban school districts is the belief on the part of many students that no one no--adults in the school at least--care very much about them or believe in their capacity to succeed. This is why this Supreme Court must emphasize in its decision over and over again that "All Kids Can Learn." In business terms, school districts must believe that their first obligation is to their "customers," conceived as the students; to "quality," defined as meeting the needs of those customers; and to "zero defects," defined as a situation in which all students achieve educational opportunities at high qualitative levels.

But, just as in business, belief without action is of little value. There can be no doubt that if this Supreme Court enacts the legal accountability, it will see immediate and beneficial results for kids who want to learn. Undoubtedly, school districts will negotiate a provision in the teachers' contract providing for a district-wide policy requiring secondary-school teachers to take personal responsibility for a group of students, keeping track of their

academic progress in all their courses, and being in regular touch with their parents. Although many teachers will take the view that they never signed up to be social workers, many others will agree with the aims of the program emanating from this Supreme Court's decision. Do not forget, teachers are not bureaucrats. Most of them do really care about teaching kids. If the school districts move toward improving the educational opportunities they afford their elementary students, parents will follow in kind. No parent wants their child to miss the educational opportunity to be learned and literate.

The community of Santa Ana's aspirations for its children are as high as those of any other community. Their expectations, on the other hand, are very low. And why shouldn't they be, their kids are not being given a real chance to learn even the basics such as reading and writing. Where there is a will, there is not necessarily a way. Through the light of Good Law, this Supreme Court shall emblazon that way, and the children and parents of Santa Ana will follow Your lead!

Now is the time to help elementary students, for what keeps the rhythmic cycle of education in motion is the lure of value to be

obtained. The value cannot all be eventual, however. Life is lived and its various values are concurrently interrelated along lines of a continuous present. The charm of basic academic skills lies in its immediacy, its direct appeal, the significance and flavor that it gives to the student's present moment. Where the element of reading writing and arithmetic is unattained, more complex values and meanings have no foundation, and true generality of viewpoint is difficult if not impossible. In short, life is underlived.

It is by thinking ably that we are able to translate ideals into realities, to adapt our environment to what we conceive will be more conducive to survival and progress. Language and mathematics as means of communication and classification are essential skills, if we are ever to recognize order in our experience or connect probable consequences with present decisions. The children of Santa Ana need Your help, now. Not tomorrow.

now

CONCLUSION

Thus, at present, the Laws seem to indicate that the supposed American commitment to universal public education is, in fact, nothing more than a congregational recitation of unexamined slogans and unenforced federal statutes. We do not know what we mean by an education, because we have not examined the language in which we describe it. We have not examined that language because we are not in the habit of examining language. We are not in that habit because we have been corporately educated in a system in which the critical examination of language and the skills required for that examination are less and less taught. They are less and less taught because they are less and less to be found among those who teach and those who direct the course of education. They are less and less to be found because people who do have the skills of critical thought and clear language are not likely to waste them by going to work in an institution founded on the recitation of unexamined slogans. It takes some kind of a fool to spend his life in the maximization of potential through the application of sets and subsets of actions

aimed at the translation, transformation, and organization of matter into meaning for individuals and groups. Only the thoughtless can pompously tell themselves about things like behavior modification and catalytical non-disciplines and preassessment instruments. No one skilled in language and thought could keep his sanity in that world of empty jargon, where he would find himself set to the task of pretending to clarify fictitious values and enhancing the self-esteem of the utterly unskilled by preaching that a positive self-image is more important than a clear sentence. In short, as Nietsche's first page quote so aptly describes,, the land of public education provides a happy home only for those in whom the skills of language and thought are but poorly developed. When linguistically skilled persons do wander into that world, they must soon either leave it or withdraw into the privacy of their own classrooms and learn to ignore everything else. They are strangers in a strange land where the natives speak no rational tongue at all.

The absence of a rational language is necessary to the peace of that system. Its unreason provides pretended answers to the questions we might ask about incentive. We ask, Just why do you

want to succeed in teaching the young? They answer: Because we are professionals committed to excellence and quality instuction (not minimal outcome!). What is "quality education"? Here are the answers of a widely read educator. It is an education in which, "students are taught to appreciate cultures other than their own and to perceive themselves in a positive light. In addition, they are encouraged to express their feelings openly and honestly, to develop and maintain good interpersonal relationships and to question basic Ideas."

This is a pile of crap.

These empty slogans were put forth in defense of the schools against the charge of failing to teach elementary skills of reading and writing. In what language then will those students "question basic ideas"? How will they know them when they see them? Will they ever question the basic ideas implicit in "appreciating" cultures and perceiving themselves in "positive lights"? These are not, it is important to note, the words of an eccentric educator swimming against the tide. They express the orthodox creed. The robe of education in our time is a scanty garment; most of it is lunatic fringe.

A line runs from the meditations of the heart to the words of the mouth. The meditations are not clear to us until the mouth utters its words. If what the mouth utters is unclear or foolish or mendacious, it must be that the meditations are the same. But the line runs both ways. The words of the mouth will become the meditations of the heart, and the habit of loose talk loosens the fastenings of our understanding.

Sometimes we all know that. When a functionary of our government tells us that his previous statements have suddenly become "inoperative," we see that what has been committed is not a euphemism but an immorality. While pretending to admit to the truth, the word evokes a world that never was, a world in which sentences that were once "true" now become, through some random twitch of history, not exactly "false" but at least ineffective, like an engine that used to start but does not anymore now that the weather has turned cold. One may snicker and even sneer at the man who tells us that his words have now become "inoperative," but he still has a victory. He has put that tiny worm into our ears. It will eat its way into our brains and dull some power of language, so that when his successors later talk to us

about "enhanced linguistic devices" we may sneer and snicker less. When enough of those worms have made their homes in our skulls—how long do you suppose that will take?—the day will come when we merely nod.

And from nodding we will go to dozing, and from dozing, to sleep. The U.S. Supreme Court must wake-up this Nation to the unConsitututionality in any lower court holding that, "there is no actionable duty of care in those who administer the academic process of the public educational process." [Excerpt from State Appellate Court's ruling] [Emphasis added]

You are the Brethren, of Justice. Please act accordingly, and as importantly—swiftly.

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Thus I came to you, O men of today, and into the land of education.... But what happpened to me? For all my anxiety I had to laugh. Never had my eyes beheld anything so dappled and motley. I laughed and laughed while my foot was still trembling, and my heart no less. "This is clearly the home of all paint pots," I said...

--Nietzsche, Thus Spoke Zarathustra[11]

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[11] Nietzsche, *The Portable Nietzsche* (New York Viking, 1954), p. 231.